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SUPREME COURT OF THE UNITED STATES

No. 393

HARRY J. WISNER,

Appellant,

vs.

KATHLEENE KAMINSKI, A.K.A. CATHERINE MILLER WISNER KAMINSKI

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

RALPH ATKINSON,
Counsel for Appellant.

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IN THE SUPREME COURT OF OHIO

No. 31333

APPEAL FROM THE COURT OF APPEALS OF COLUMBIANA COUNTY, OHIO

In re GUARDIANSHIP OF CATHERINE MILLER WISNER,[1] NOW KATHLEENE KAMINSKI, Formerly a Minor

KATHLEENE KAMINSKI,
Applicant-appellee,

vs.

HARRY J. WISNER,[1]
Appellant

JURISDICTIONAL STATEMENT IN SUPPORT OF PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

This statement supports a petition for appeal to the Supreme Court of the United States from a judgment of

[1] The name "Wisner" is pronounced *Wise*-ner.

the Supreme Court of Ohio which, on the stated ground that "no debatable constitutional question is involved", dismissed an appeal of right on constitutional questions from the Court of Appeals of Columbiana county, Ohio. *In re Wisner*, 149 Ohio St. 488, 79 N.E. 2d 327, decided May 5, 1948. An application for rehearing was duly filed May 18, 1948, pursuant to Rule XX of the Supreme Court of Ohio; for Rule XX, see 147 Ohio St. at page lxxv. The application for rehearing was denied and the mandate issued June 2, 1948; see 21 Ohio Bar 159. This jurisdictional statement, together with the accompanying petition for appeal and assignment of errors, has been duly filed with the Clerk of the Supreme Court of Ohio and is duly presented on August 30, 1948, being within three months from said denial of said application for rehearing. See *Gypsy Oil Company* v. *Escoe* (1927), 275 U. S. 498, 72 L. Ed. 393, 48 S. Ct. 112.

Statement of Jurisdictional Questions

This statement deals with the question whether, under Judicial Code § 237 (a), 28 U.S.C. § 344 (a), 28 U.S.C.A. §344(a), the Supreme Court of the United States has jurisdiction to review on appeal the foregoing judgment of the Supreme Court of Ohio. The question just stated raises five subsidiary questions, namely: *first*, whether said determination by the Supreme Court of Ohio is a "judgment or decree" of the highest state court; *second*, whether it is "final"; *third*, whether there is drawn in question in this case the validity of a statute of Ohio on the ground of its being repugnant to the Constitution of the United States; *fourth*, whether said judgment of the Supreme Court of Ohio is "in favor of" the validity of said statute; and *fifth*, whether the questions concerning the validity of said statute are "substantial" questions.

The Statute Involved

The Ohio statute, the validity of which as construed and applied in this case is called in question, is Ohio General Code §10506-55, 114 Ohio Laws 375. It reads as follows:

> "§10506-55. If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated or otherwise unable to act, prior to the termination of the trust, the Probate Court shall require a final account of all dealings of such trust to be filed forthwith by such fiduciary if a living person and able to act; or if such fiduciary be a living person but unable to act, by his guardian, if any, or if there be no guardian, by some other suitable person in his behalf, appointed or approved by the court; or if such fiduciary be a deceased person, by his executor or administrator; or if such fiduciary be a dissolved corporation, by such person or persons as may be charged by law with winding up the affairs of such corporation. Thereupon, the Probate Court shall cause such proceedings to be had as are provided by law as to other accounts filed by fiduciaries.
>
> "Whenever such a vacancy occurs [*i.e.*, 'If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed or becomes incapacitated or otherwise unable to act prior to the termination of the trust'] and such contingency is not otherwise provided for by law or by the instrument creating the trust, or whenever such instrument names no fiduciary[2] whatever, the court shall, either on its own motion or on the application of any person beneficially interested, appoint and issue letters of appointment as fiduciary to some competent person or persons who shall qualify according to law and execute the trust to its proper termination.

---

[2] It aids in grasping the general scheme of § 10506-55, although it is not otherwise pertinent, to note that, as used in the second paragraph of said section, the term "fiduciary" includes *nominees* as fiduciary, whereas, in the first paragraph, it includes only persons who have actually accepted appointment as fiduciary. The contingency "declines to accept" can of course apply only to nominees who decline to accept, and it therefore applies only in connection with the provisions of the second paragraph.

> "Such vacancy, and the appointment of a successor fiduciary, shall not affect the liability of the former fiduciary, or his sureties, previously incurred."

As used in the foregoing statute, the term "fiduciary" refers principally and perhaps exclusively to testamentary trustees, personal representatives of decedents, and guardians of minors, lunatics and other incompetents.[3] The term "trust" is not confined to its ordinary narrow meaning. It is used broadly to include the trust confided to and assumed by any "fiduciary"; see Ohio General Code §10506-2, 114 Ohio Laws 364.

Particular attention is directed to the second paragraph of §10506-55, *supra*. It is the general statute which, whenever any "trust" is vacant as a result of one of the contingencies the statute names, and there is no other provision for the contingency, authorizes the Probate Court to fill the vacancy by appointing a testamentary trustee, personal representative or guardian to undertake or complete the administration of the testamentary trust, decedent's estate or guardianship in question.[4]

The constitutional objections to §10506-55, *supra*, do not arise out of anything readily apparent upon its face. They are directed against what has been read into it.

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[3] See the enumeration of fiduciaries the Probate Court has jurisdiction to appoint in Ohio General Code § 10501-53, 114 Ohio Laws 335; then see Ohio General Code § 10506-1, 114 Ohio Laws 364, which specifically excludes part of the fiduciaries enumerated in §10501-53 from the definition of "fiduciary." It may be that under certain circumstances the Probate Court has jurisdiction to appoint fiduciaries, such as receivers, that are not catalogued in §10501-53. If so, they would be included within the meaning of "fiduciary" except as deemed to be excluded by the provisions of §10506-1.

[4] Some testamentary trustees are appointed in the first instance under §10506-55, as are some guardians. All successor testamentary trustees are appointed pursuant to its provisions, as are all successor guardians except where a minor selects a new guardian after reaching age 14 (controlled by § 10507-60) and all successor personal representatives (*i.e.*, administrators *de bonis non*) except where the previous personal representative dies (controlled by § 10509-20).

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Nature of Case, Rulings of Courts Below and Constitutional Questions Presented

The effect of the judgment of the Supreme Court of Ohio, as is evident, was to approve and affirm the judgment of the Court of Appeals with respect to all constitutional questions. Therefore, in order to discover the constitutional questions involved and to answer most of the jurisdictional questions, it is necessary to examine the judgment of the Court of Appeals. The constitutional questions, as will become apparent, are largely procedural questions involving denial of due process and equal protection.

Before stating the constitutional questions, however, it is necessary to sketch briefly certain background facts and also to furnish a partial skeleton of the history of the present case.

Background Facts

November 1, 1921, Anna Miller was left a widow with a four months old daughter, Catherine Miller, who is now the appellee, Mrs. Kathleene Kaminski.

May 12, 1923, the then Mrs. Miller was appointed by the Probate Court of Columbiana county, Ohio to be the guardian of her daughter's person and estate. That fall, Mrs. Miller married the appellant, Harry J. Wisner. The following summer, Mr. Wisner legally adopted the then Catherine Miller as his daughter.

Anna Miller Wisner continued to be the guardian of her daughter's person until her daughter's marriage to one Edwin F. Kaminski on June 20, 1940. (See Ohio General Code §10507-20, 114 Ohio Laws 388.) Mrs. Wisner still remained the guardian of her daughter's estate until June 17, 1942, Mrs. Kaminski's twenty-first birthday. Thereupon, the guardianship of the estate also terminated. (See §10507-60, 114 Ohio Laws 398.)

July 31, 1942, shortly after the guardianship ended, the

Probate Court duly heard, approved and settled Mrs. Wisner's accounts as guardian, closed the matter of the guardianship and discharged Mrs. Wisner from liability as former guardian.

Mrs. Kaminski claims that on or sometime after October 7, 1942, she commenced in the Probate Court an action against her mother to open said accounts for the purpose of surcharging and falsifying them. As will subsequently appear, there is a serious question whether any such action was ever commenced.

However, Mrs. Kaminski created sufficient stir to cause the bonding companies who had been Mrs. Wisner's sureties as guardian to demand of Mrs. Wisner that she indemnify and secure them against any expense of litigation they might incur and also against possible liability on her bond. Mrs. Wisner met said demand by transferring to said sureties, with her husband's consent, a fund in which she and Mr. Wisner each had an equal undivided half interest. As a result of Mr. Wisner's interest in this fund, he has had a direct pecuniary interest in the successful defense of Mrs. Wisner's accounts ever since.

November 10, 1943, before the action against Mrs. Wisner, if any, was at issue, she died intestate.

December 10, 1943, Mrs. Kaminski instituted proceedings for the appointment of her father, appellant Harry J. Wisner, as her mother's personal representative—ostensibly so that she might have an opportunity to revive against him her alleged action against Mrs. Wisner. She won these proceedings and Mr. Wisner was appointed. However, after Mrs. Kaminski had thus procured the opportunity to revive, she did nothing with it. She let Mr. Wisner complete the administration of her mother's estate, file his final account and tender his resignation as personal representative without making a single gesture toward revivor.

July 31, 1944, after Mr. Wisner had successfully de-

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fended his final account against exceptions filed by Mrs. Kaminski that accused him, among other things, of fraud, his said account was duly approved and settled by the court, his resignation was accepted and he too was discharged. An appeal by Mrs. Kaminski from this judgment was ultimately dismissed the following spring—after a hearing, a hearing on an application for rehearing, and a rehearing. Mrs. Kaminski did not appeal from the judgment of dismissal.

Also, as soon as Mr. Wisner had been discharged as Mrs. Wisner's personal representative, Mrs. Kaminski purported to commence a proceeding to revive against him as such personal representative her alleged action against her mother. This proceeding, which was also very vigorously litigated, proceeded simultaneously with the aforesaid appellate proceedings until they were dismissed. Ultimately, in October, 1945, the purported revivor proceeding was of course also dismissed, although only after giving rise to a side litigation to which Mrs. Kaminski was not a party that will be mentioned again in a moment. Mrs. Kaminski did not appeal from the judgment dismissing the purported revivor proceeding.

The Present Case

October 30, 1945, Mrs. Kaminski commenced the present case by filing in the Probate Court of Columbiana county an *ex parte* application entitled "Application to Appoint Successor Fiduciary." Purportedly, this pleading was an application to appoint a fiduciary under the second paragraph of §10506-55, *supra*. It followed the language of that paragraph closely and was filed in the matter of Mrs. Kaminski's guardianship, not in the matter of the late Mrs. Wisner's estate.

In the side litigation previously mentioned, the Supreme Court of Ohio had expressly held that appointing a fiduciary

in Mrs. Kaminski's guardianship under §10506-55 would constitute "the appointment of a *guardian* as successor to [Mrs. Kaminski's] deceased guardian,"[5] Under said decision, therefore, the *ex parte* "Application to Appoint Successor Fiduciary" that Mrs. Kaminski filed October 30, 1945 was an application to appoint a guardian of herself. It is true that Mrs. Kaminski was not a party to that case and that the Supreme Court's decision was not *res judicata* as to her. Nevertheless, it was an expression of the law of Ohio.

In spite of the foregoing facts, the Probate Court, looking at a record said Supreme Court had not seen, believed that Mrs. Kaminski did not need or want a guardian. However, the Probate Court saw that a successor personal representative of the late Mrs. Wisner might be of use to Mrs.

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[5] See paragraph 3(e) of the "Syllabus by the Court," *Wisner* v. *Probate Court* (1945), 145 Ohio St. 419, 61 N. E. 2d 889.

Wisner v. *Probate Court* was a prohibition case decided on demurrer to a petition of which the pertinent allegations can be summarized briefly as follows: December 6, 1944, during the course of Mrs. Kaminski's purported revivor proceeding against Mr. Wisner, a judge of the Probate Court threatened to appoint in the closed guardianship of Mrs. Kaminski a "successor fiduciary" under §10506-55, *supra*. The threat was ambiguous. It could be a threat to appoint a new guardian of Mrs. Kaminski. However, the language of the threat strongly suggested that what the judge actually intended to appoint was a new personal representative to succeed Mr. Wisner as the administrator of the Estate of Anna Miller Wisner, deceased. Perhaps the most crucial question in the prohibition case was how the Supreme Court of Ohio would interpret the threat. If it interpreted it as a threat to appoint a new personal representative of Anna Miller Wisner, deceased, then, since Mr. Wisner had been appointed by the Probate Court of *Stark* county, Ohio, a writ of prohibition would be granted; *State ex rel. Taylor* v. *Gregory* (1930), 122 Ohio St. 512, 172 N.E. 365. The proper interpretation of the threat was strenuously argued. The Supreme Court of Ohio decided the question by simply holding without comment that a threat to appoint a fiduciary in Mrs. Kaminski's guardianship was necessarily a threat to appoint a new guardian for Mrs. Kaminski. It then dismissed the prohibition case, thereby dissolving the temporary writ of prohibition. (As previously noted, the Probate Court promptly dismissed the purported revivor proceeding against Mr. Wisner and Mrs. Kaminski did not appeal.)

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Kaminski in her alleged action against Mrs. Wisner. It therefore thought that was what she must want. Accordingly, the Probate Court treated said application as an application to appoint such a personal representative. (Unfortunately, the Probate Court did not think to require Mrs. Kaminski to restyle and refile said application in the "Matter of the Estate of Anna Miller Wisner, deceased." As a result, the subsequent proceedings in this case have still been entitled in Mrs. Kaminski's guardianship. This has caused some confusion.)

Mrs. Kaminski refused to commit herself either to the Supreme Court's theory or to the Probate Court's theory. Instead, she hinted that perhaps the proposed fiduciary was to be some third kind of fiduciary. However, she would not indicate whose interest she expected him to protect or represent.

January 4, 1946, following a trial of said application on its merits as an application to appoint a successor personal representative of Anna Miller Wisner, deceased, the Probate Court denied and dismissed it. From this judgment, Mrs. Kaminski prosecuted an "appeal on questions of law" (*i.e.*, error; see Ohio General Code §12223-1, paragraph 2, 116 Ohio Laws 105) to the Court of Appeals of Columbiana county, Ohio.

Harry J. Wisner first became a party to this case in the Court of Appeals. September 17, 1947, he duly filed in said court an application for leave to intervene in the case as a party appellee (*i.e.*, as a defendant in error). His affidavit in support of said application read, in part, as follows:

> "The above entitled matter is an appeal on questions of law from a judgment of the Probate Court of Columbiana county denying a certain application addressed to that court by the appellant, Kathleene Kaminski. Said application is ambiguous and may have been for

the appointment either of a guardian for Kathleene Kaminski or of a personal representative of the late Anna Miller Wisner.

"In either event, Harry J. Wisner was and is an interested party with respect to said application. He is Kathleene Kaminski's father and the surviving spouse of the late Anna Miller Wisner.

"Said application failed to name the next of kin of either Kathleene Kaminski or Anna Miller Wisner as it was required by law to do. As a result, no notice of the filing of said application or of the proceedings on the same was issued or served on any of said next of kin as required by law, although J. Frederick Bryan, a brother of Kathleene Kaminski and a son of the late Anna Miller Wisner, then was and now is a resident of Salem, Ohio in Columbiana county. Had such notice been served on said J. Frederick Bryan, the contents of the same would have been communicated to Harry J. Wisner.

"Harry J. Wisner had no knowledge, actual or constructive, of the filing of said application in said Probate Court or of the proceedings thereon until after this cause was last argued in this court."[6]

September 19, 1947, the Court of Appeals found Mr. Wisner's affidavit to be true and made the following order:

"This day this cause came on to be heard on an application by Harry J. Wisner for leave to intervene in this cause as a party appellee and for leave to file a brief in support of the judgment appealed from, notice that such application would be made having been given counsel for appellant.

"On consideration, the Court finds that the facts set forth in the supporting affidavit annexed to said application are true, that Harry J. Wisner is an interested party, and that he ought to be made a party appellee.

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[6] After a previous hearing, the Court of Appeals had dismissed for lack of jurisdiction. However, its judgment of dismissal had been reversed; *In re Wisner* (1947), 148 Ohio St. 31, 72 N. E. 2d 751.

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"Said application is therefore sustained and Harry J. Wisner is hereby made a party appellee with leave to file a brief herein, service of a copy of said brief to be made on counsel for appellant on or before October 25, 1947."

The foregoing findings and order have never been disturbed and are in full force and effect.

Since the proceedings in the Court of Appeals were proceedings in error, Mr. Wisner was of course not permitted to introduce evidence in said court on the merits. As the foregoing order indicates, he was confined to opposing by argument Mrs. Kaminski's claim that the incomplete record she had caused the Probate Court to transmit to the Court of Appeals exhibited error prejudicial to her, error that would justify reversing the Probate Court's judgment and remanding the case to said court for a new trial on her application.

The ultimate judgment of the Court of Appeals was adverse to Mr. Wisner. Part of its details appear from the assignment of errors set forth in the next paragraph. The balance are stated in connection with the constitutional questions presented.

From the adverse judgment of the Court of Appeals, Mr. Wisner took an appeal of right on constitutional questions to the Supreme Court of Ohio. His assignment of the errors committed by the Court of Appeals, which he duly filed in said Supreme Court pursuant to Ohio General Code §12223-21, 116 Ohio Laws 109, was as follows:

"Now comes Harry J. Wisner, appellant herein, and says that there is error prejudicial to his rights manifest in the record, proceedings and final judgment in this cause of the Court of Appeals of Columbiana county, Ohio in this, to wit:

"I. The Court of Appeals erred in reversing and

not affirming the judgment in this cause of the Probate Court of Columbiana county, Ohio.

"I*a*. The Court of Appeals erred in holding applicant's [*i. e.*, Mrs. Kaminski's] 'Application to Appoint Successor Fiduciary' to be a valid application under G. C. §10506-55 to appoint a fiduciary and in not holding said application, and said statute if construed to authorize the application, to be invalid because repugnant to Article I, §16 of the Constitution of the State of Ohio and to §1 of the XIV Amendment to the Constitution of the United States.

"II. The Court of Appeals erred in that, contrary to Article I, §16 of the Constitution of the State of Ohio and to §1 of the XIV Amendment to the Constitution of the United States, said court construed §10506-55 of the General Code of Ohio to authorize it to, and said court did:

"A. Grant applicant's 'Application to Appoint Successor Fiduciary' without disclosing to Harry J. Wisner said court's conception of the character of the fiduciary applied for, thus denying Harry J. Wisner an opportunity to be heard on said application as thus considered.

"B. Direct the Probate Court to appoint a fiduciary without disclosing whether said fiduciary was to be a guardian of applicant or a personal representative of Anna Miller Wisner, deceased, thus depriving Harry J. Wisner, in the alternative, either of his right to be heard for the purpose of insisting upon the appointment of a proper person as applicant's guardian or else of his right to *be* the personal representative appointed, each of said rights being a vested right conferred upon him by the laws of Ohio.

"C. Revive a certain pretended dormant action by applicant when applicant had not yet commenced any proceeding to revive said action and when the merits of said revivor proceeding had therefore never been tried on the facts, thus denying Harry J. Wisner an

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opportunity to be heard on the merits of said revivor proceeding.

"D. Decide the merits of a pretended dormant action by applicant to open the accounts of the late Anna Miller Wisner, applicant's former guardian, and thereupon opened said accounts, at a time when the trial court had never tried said pretended action on its merits and had not yet determined whether any valid action had ever been commenced, thus denying Harry J. Wisner an opportunity to be heard on the merits of said action.

"III. The Court of Appeals erred prejudicially to the rights of appellant in other respects manifest on the face of the record of said court.

"Appellant further says that the several errors aforesaid were carefully called to the attention of the Court of Appeals prior to the entry of its judgment and the taking of this appeal.

"WHEREFORE: Appellant prays that the judgment of the Court of Appeals may be reversed, that the judgment of the Probate Court may be affirmed, and that appellant may have such other or further relief in the premises as justice may require."

The Supreme Court of Ohio, having considered the foregoing assignment of errors, held, as already stated, that "no debatable constitutional question is involved" and dismissed the appeal. From this adverse judgment, Mr. Wisner seeks to appeal to the Supreme Court of the United States.

Constitutional Questions

Question 1; Facts

As the Court of Appeals found in its order making Mr. Wisner a party, the pleading entitled "Application to Appoint Successor Fiduciary" (page 38 below) is am-

biguous. When Mr. Wisner was made a party he had no way to discover whether it was an application to appoint (a) a successor personal representative of his deceased wife, (b) a successor guardian of his daughter, or possibly (c) some other kind of fiduciary. He had no way to know whether the Court of Appeals would agree with the Supreme Court of Ohio's holding on the subject or with the Probate Court's, or whether it would have some third theory of its own.

However, one thing was then and still is clear. On any conceivable theory of said pleading, Mr. Wisner was and is an interested person with respect to it, to wit:

(a) If it is an application to appoint a successor personal representative (*i. e.*, an administrator *de bonis non*) of his late wife, Anna Miller Wisner, then he has a clear right to be heard in all proceedings on the application (Ohio General Code §10509-3, 116 Ohio Laws 393; Ohio General Code §10509-4, 116 Ohio Laws, part 2, 28); a right he would exercise to interpose seven defenses to such an appointment. Moreover, if, notwithstanding his defenses, it should be determined that a personal representative is to be appointed on said application, he has a vested statutory right to *be* that personal representative; *ibid; In re Golembiewski* (1946), 146 Ohio St. 551, 67 N. E. 2d 328.

(b) If said pleading is an application to appoint a guardian of his daughter, Mrs. Kaminski, then, as Mrs. Kaminski's father, Mr. Wisner has a clear right to be heard in all proceedings on the application (Ohio General Code §10507-4, 114 Ohio Laws 384); a right he would exercise to interpose four defenses to any such appointment. Were it held, despite his defenses, that a guardian of Mrs. Kaminski is necessary, he would have a right to be heard

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for the purpose of insisting on the appointment of a proper person as Mrs. Kaminski's guardian; *ibid.*

(c) If said pleading is an application to appoint some third kind of fiduciary, then Mr. Wisner's precise rights are unknown. However, the frame of circumstances surrounding the application is such that said pleading cannot have a character that will not affect Mr. Wisner vitally, as will appear.

As already stated, Mr. Wisner's wife was the former guardian of their daughter, Mrs. Kaminski. After Mrs. Wisner's accounts had been settled, but before her death, Mrs. Kaminski subjected her to a prolonged litigation over the former guardianship. After Mrs. Wisner died, Mr. Wisner was appointed her personal representative. He in his turn, both before and after his discharge as Mrs. Wisner's personal representative, was also subjected to prolonged litigations by Mrs. Kaminski, first over the matter of her mother's estate and then over the matter of the guardianship. Part of the time, she conducted litigations against him in two counties simultaneously.

One by one, Mr. Wisner won the various litigations against him in connection with these matters. Despite the ambiguity of Mrs. Kaminski's "Application to Appoint Successor Fiduciary," said application is plainly designed to reopen one or both of said matters in order to resume litigation. However, Mr. Wisner has numerous valid defenses against a reopening of either matter,[7] among them *res judicata*. He earnestly desires to utilize said defenses to put a final end to litigation by keeping any part of either matter from being again opened up.

However, as Mr. Wisner pointed out to the Court of

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[7] A partial list of Mr. Wisner's defenses is set forth in the opinion of the Court of Appeals. It quotes in its entirety the summary at the end of his brief in that court; see appendix pages 54-55 below.

Appeals (see pages 44-45), the ambiguity of the "Application to Appoint Successor Fiduciary" makes it impossible for him to utilize any of his defenses effectively. If he defends on one theory of the application, the courts may hold his defenses invalid because they have adopted another theory of it. The only way he can perfect a complete defense to said pleading is first to guess and set forth all the possible theories of it, and then perfect defenses to it on each theory. To attempt this, however, will expose him to two perils, *first*, that he will fail to guess the theory of the application ultimately adopted by the courts, *second*, that if he does construct such a labyrinth of alternative theories and defenses, he will confuse the courts thoroughly. Even though he guessed the right theory and established a good defense to the application on that theory, his correct solution of the puzzle could easily be overlooked by the courts as they tried to thread their way through the maze. (Perhaps something like this actually happened in the Court of Appeals. See prefatory note, page 48.)

In Mr. Wisner's argument to the Court of Appeals (see pages 43 to 45 below), he claimed that said pleading was constitutionally invalid. He pointed out that, if the Court of Appeals reversed the judgment of the Probate Court and remanded for a new trial on said application as requested by Mrs. Kaminski, it would thereby require him to perfect a defense against the application under penalty of having a fiduciary appointed on it if his defense failed. Mr. Wisner argued that, if the Court of Appeals required him to try to perfect a defense against so hopelessly ambiguous a pleading, it would thereby violate §1 of the XIV Amendment to the Constitution of the United States. It would be denying him the reality of a hearing on the application considered in its true character. Therefore, Mr.

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Wisner argued, since the inevitable consequences of holding said pleading valid were thus repugnant to the constitutional provision aforesaid, said pleading was constitutionally invalid. Since the pleading was invalid, the Probate Court's judgment denying and dismissing it was necessarily correct. Since said judgment was correct, it should be affirmed.

Rulings: The Court of Appeals' judgment (pages 57-8) reversed the Probate Court's judgment, thus holding said application to be a valid pleading authorized by §10506-55, *supra.* The Supreme Court of Ohio has approved this holding (see above).

Question: When §10506-55 is construed to authorize such a pleading, and therefore to require a person adversely interested to perfect a defense to it, is said statute repugnant to §1 of the XIV Amendment to the Constitution of the United States?

Question 2; Facts and Rulings

When the Court of Appeals reversed the judgment of the Probate Court, it construed § 10506-55 to permit it to render final judgment granting Mrs. Kaminski's "Application to Appoint Successor Fiduciary." It rendered its final judgment in favor of said application by remanding to the Probate Court, not for a new trial on the application, but with peremptory instructions to appoint a "fiduciary" on it. (See Court of Appeals' judgment, page 57, and the last paragraph of its opinion, pages 56-57.) The Court of Appeals has left the Probate Court with no discretion to do anything but appoint the ambiguous "fiduciary" prayed for (*ibid.*), leaving it to future litigation to determine what kind of fiduciary he is and whose interest he is supposed to protect and represent.

When the Court of Appeals rendered final judgment

granting said application instead of remanding for a new trial, it deprived Mr. Wisner of any opportunity ever to be heard on the merits of the application, even in its ambiguous state. Mr. Wisner had had no notice or knowledge, actual or constructive, of the proceedings in the Probate Court. He had therefore had no chance to plead, introduce evidence or be heard there in any way. Since the proceedings in the Court of Appeals were proceedings in error, he of course could not be heard on the merits in that court.

The foregoing effects of the Court of Appeals' judgment were duly and explicitly pointed out to said court at the earliest possible moment, to wit, by timely application for rehearing immediately following the announcement of its decision and before its actual judgment. (See pages 46-48 below.) The Supreme Court of Ohio has approved said judgment (page 59, and see above).

Question: When §10506-55 is construed to authorize and license the Ohio courts thus to deny to Mr. Wisner any hearing whatever on the merits of the "Application to Appoint Successor Fiduciary," even in its ambiguous state, and therefore to strip him of his rights without a hearing on the merits, is § 10506-55 repugnant to § 1 of the XIV Amendment to the Constitution of the United States?

Question 3; Facts and Ruling

As we have seen, the Court of Appeals, in accordance with its construction of §10506-55, *supra,* has commanded the Probate Court to appoint a fiduciary of which no one knows or can know the nature until after he has been appointed. The effect of thus concealing from Mr. Wisner the character of the fiduciary to be appointed is to take and destroy every right, substantive and procedural, that Mr. Wisner has left in the premises. For example:

(a) Mr. Wisner cannot exercise his right to *be* the per-

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sonal representative of his deceased wife, Anna Miller Wisner; the Court of Appeals, by the ambiguity of its judgment, has made it illegal for him either to seek or accept the appointment as fiduciary. The ambiguity, as previously noted, is such that the proposed fiduciary could easily turn out to be Mrs. Kaminski's guardian, and, as the the Court of Appeals was well aware, Mr. Wisner has pecuniary interests directly adverse to Mrs. Kaminski's.

(b) Mr. Wisner cannot exercise his right to seek the appointment of a proper guardian for Mrs. Kaminski; the proposed fiduciary could just as easily prove to be a new personal representative of Mrs. Wisner, and Mrs. Kaminski, as the Court of Appeals was also well aware, claims pecuniary interests violently adverse to Mrs. Wisner's. It would therefore be grossly improper for Mr. Wisner to seek, or for the Probate Court to appoint, any active partisan of Mrs. Kaminski's as fiduciary. A partisan of hers, if he proved to be a representative of Mrs. Wisner's interest, would inevitably be tempted to betray that interest to Mrs. Kaminski.

(c) Mr. Wisner cannot exercise the rights he has if the appointee proves to be a third kind of fiduciary because, in that event, the Court of Appeals has denied him even a hint from which to guess what his actual rights are.

The foregoing effects of the Court of Appeals' judgment were pointed out to the Court of Appeals at the earliest possible moment by the timely application for rehearing already mentioned. Said judgment has been approved by the Supreme Court of Ohio.

Question: When §10506-55 is construed to authorize the Ohio courts thus to hide from Mr. Wisner the identity of his substantive rights in the premises, and therefore to strip him of them with no chance to exercise them or be

heard in their defense, is §10506-55 repugnant to §1 of the XIV Amendment to the Constitution of the United States?

Question 4; Facts

The first three constitutional questions, as we have just seen, arise out of the Court of Appeals' judgment in connection with the case adjudicated by the Probate Court, to wit, the case Mrs. Kaminski commenced by filing her "Application to Appoint Successor Fiduciary." The fourth constitutional question does not arise out of that case. It arises because the Court of Appeals, in its judgment, also finally adjudicated the merits of another related but entirely *different* case; a case the Probate Court had never tried at all, even *ex parte*. Indeed, the case had never been at issue and the Probate Court had not yet decided whether any such case had ever been validly commenced. The facts are as follows:

Mrs. Kaminski claims that, after the final settlement of Mrs. Wisner's accounts as Mrs. Kaminski's guardian on July 31, 1942 but before Mrs. Wisner's subsequent death on November 10, 1943, Mrs. Kaminski commenced in the Probate Court an action against her mother to open her mother's said accounts.

October 7, 1942, Mrs. Kaminski did tender to and file in the Probate Court what purported to be a set of exceptions to said accounts. In an action to open settled accounts, a set of exceptions surcharging and falsifying the accounts involved is of course proper and necessary. It purports to show what the complainant expects to gain if the accounts are opened. Moreover, if the settlement of the accounts is successfully annulled and the accounts are opened up for a consideration of the exceptions, the exceptions become the pleading that raises the issues for trial in the new accounting that ensues. However, although Mrs.

Kaminski filed the purported exceptions mentioned above, every other element necessary to commence an action to open her mother's accounts was missing. For example, Mrs. Kaminski did not allege or otherwise disclose the cause of action for opening said accounts on which she relied.

It is now discovered that, when Mrs. Kaminski appealed to the Court of Appeals, she did not cause the Probate Court to include in the record transmitted in support of her appeal the crucial pleadings on which she bases her claim. The Probate Court still has them, including the alleged exceptions. Therefore, the important federal questions that would be presented on a full record by her claim that she commenced a valid action to open Mrs. Wisner's accounts, or rather by the holding of the state appellate courts sustaining her claim, cannot be raised. However, the fact that the state appellate courts have sustained Mrs. Kaminski's claim without having said pleadings before them, and therefore without having the means of knowing whether she ever started any such action or not, presents a question that is raised.

Following Mrs. Kaminski's foregoing attack on her mother's accounts, the bonding companies who had been Mrs. Wisner's sureties as guardian demanded that Mrs. Wisner indemnify and secure them against the expenses of litigation they might incur because of it and also against possible liability on her bond. With Mr. Wisner's consent, Mrs. Wisner transferred to said sureties a fund in which she and Mr. Wisner each had an undivided half interest. As a result of his interest in this fund, Mr. Wisner has at all times since had a direct pecuniary interest in the successful defense of Mrs. Wisner's accounts. (See Mr. Wisner's bill of exceptions in the Court of Appeals.)

November 10, 1943, with the alleged action to open Mrs.

Wisner's accounts still in the motion stage, Mrs. Wisner died and said action became dormant for lack of any party defendant.

Shortly after Mrs. Wisner's death, Mrs. Kaminski forced Mr. Wisner's appointment as her mother's personal representative. She did so in order to give herself an opportunity to revive said alleged action against him. (See her application for his appointment.) However, although she provided herself with the opportunity, she did nothing with it. She let her father complete the administration of her mother's estate and file his final account without making a single gesture toward instituting revivor proceedings.

Nevertheless, Mrs. Kaminski did purport to start a revivor proceeding against Mr. Wisner as his wife's personal representative. She did so as soon as his accounts had been settled and he had been discharged. Ultimately, this proceeding, which was the only revivor proceeding she ever pretended to commence, was dismissed, although only after giving rise to the prohibition case of *Wisner* v. *Probate Court* (see note 5, page 8 above). Mrs. Kaminski did not appeal from the judgment of dismissal (*q.v.*, page 26).

Thus, when Mrs. Kaminski's appeal from the judgment denying and dismissing her "Application to Appoint Successor Fiduciary" came on to be heard in the Court of Appeals, the alleged action against Mrs. Wisner was still dormant, still untried and still not at issue. There was no reason to think the Court of Appeals would suppose said action to be before it and it gave no recognizable hint at the hearing that it did so.

Rulings: Nevertheless the Court of Appeals adjudicated said alleged action, very thoroughly. It "specifically" instructed the Probate Court "to hear and settle the exceptions filed [by Mrs. Kaminiski] to the accounts of the guardian Anna Miller Wisner in accordance with the provisions of Section 10506-55, General Code." (Page 57 below.)

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Thus, it annulled finally the settlement of Mrs. Wisner's accounts and definitively opened them up to Mrs. Kaminski's exceptions.

The Court of Appeals, although it wrote an opinion, has furnished no map of the road by which it arrived at the foregoing judgment. However, the route it took is clear. It necessarily took, *sub silentio,* three major steps, to wit:

(1) It necessarily found that Mrs. Kaminski did, during Mrs. Wisner's lifetime, start an action against Mrs. Wisner to open her accounts. However, although the Court of Appeals so found, it had no means of knowing whether any such action was ever commenced or not. The pleadings in the alleged action were not in the record before it (see above). Moreover, the question had been left undecided by the Probate Court's judgment (see page 41).

(2) Next, the Court of Appeals revived the alleged action. It is noted in passing (a) that the Court of Appeals has kept to itself the identity of the new party defendant against whom it revived the action, (b) that no person with the power to represent Mrs. Wisner's interest was or is in existence to be made a party defendant, and (c) that except for the purported revivor proceeding which was dismissed finally in October, 1945 (see page 35), no proceeding to revive said alleged action was ever commenced. The important thing, however, is that the Court of Appeals could not and did not grant any hearing on the merits and had no means of knowing whether Mrs. Kaminski had any grounds for revivor or not.

(3) Lastly, the Court of Appeals convicted Mrs. Wisner, who was then dead, of misconduct as guardian which justified opening her accounts. It is noted that the Court of Appeals did not specify the misconduct, whether fraud or something else, of which it found her guilty. More important, however, the Court of Appeals could not know whether Mrs.

Wisner was in fact guilty or innocent. It could not and did not hear evidence on the merits. Most astounding of all, there was nowhere in the record before it even an *accusation* that Mrs. Wisner had been guilty of any such misconduct (see page 21 above).

The Court of Appeals took the three foregoing steps and then annulled the settlement of Mrs. Wisner's accounts,[8] not only without having the means of knowing whether its action was justified, but also without giving Mr. Wisner or anyone else the least opportunity to be heard in any way on any issue involved. It proceeded strictly "on its own motion", on the evident premise that its action was authorized by the provisions of §10506-55, *supra*.

Question: When §10506-55 is construed to permit the Court of Appeals to decide litigation without having the means of knowing what the merits of the litigation are, is §10506-55 repugnant to §1 of the XIV Amendment to the Constitution of the United States?

Question: When §10506-55 is construed to authorize both the revivor of Mrs. Kaminski's alleged action to open Mrs. Wisner's accounts and also the final adjudication of that action in Mrs. Kaminski's favor without letting Mr. Wisner or any representative of his late wife's interest either introduce evidence or be heard otherwise on any issue involved, is §10506-55 repugnant to §1 of the XIV Amendment to the Constitution of the United States?

Jurisdictional Questions; Authorities Cited

I. Judgment of Highest State Court?

A judgment of the Supreme Court of Ohio dismissing an appeal of right on federal constitutional questions on the ground that "no debatable constitutional question is in-

[8] The above effects of the Court of Appeals' judgment were emphatically pointed out to it. See pages 47 and 48.

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volved" is a judgment of the highest court of law or equity in Ohio which, if final, is reviewable by the Supreme Court of the United States. *Tumey* v. *State of Ohio* (1927), 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243. *Van Huffel* v. *Harkelrode* (1931), 284 U. S. 225, 76 L. Ed. 256, 52 S. Ct. 115, 78 A. L. R. 453. *Haley* v. *State of Ohio* (1948), 332 U. S. 596, 92 L. Ed. —, 68 S. Ct. 302.

II. A "Final" Judgment?

"No self-enforcing formula for defining when a judgment is 'final' can be devised." *Republic Natural Gas Co.* v. *State of Oklahoma* (1948), 334 U. S. 62, 67, 92 L. Ed. —, 68 S. Ct. 972, 976.

Nevertheless, if a state judgment *is* "final," immediate federal review must be sought. Otherwise, all federal questions decided by the state court will be permanently *res judicata* and all federal remedy will be cut off. *Angel* v. *Bullington* (1947), 330 U. S. 183, 91 L. Ed. 832, 67 S. Ct. 657. *Rio Grande Western Railway Company* v. *Stringham* (1915), 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5.

In this case, the question of finality is a question whether the judgment of the Court of Appeals of Columbiana county, Ohio was final. For purposes of finality, the effect of the judgment of the Supreme Court of Ohio was the same as that of a simple affirmance.

Under *state* law, the Court of Appeals' judgment was final. That was settled for this case when the Supreme Court of Ohio entertained the appeal from the Court of Appeals for the purpose of passing on the substantiality of the constitutional questions presented instead of dismissing for want of a final judgment. As a result, all questions adjudicated by said judgment are forever *res judicata* under state law until and unless it is ultimately reversed.

However, the effect of a judgment under state law is not

the test. *Cole* v. *Violette* (1943), 319 U. S. 581, 87 L. Ed. 1599, 63 S. Ct. 1204.

Such difficulty concerning finality as exists in this case arises out of the seemingly unprecedented fact that the Court of Appeals did not confine itself to rendering judgment in the case tried by and appealed from the trial court. Instead, it also rendered judgment in a second case not at issue in the trial court which the trial court had never tried. The Court of Appeals' judgment in said second case directs an accounting.

The phase of the Court of Appeals' judgment that concerns the case tried by the Probate Court will be dealt with first.

A

The *Probate Court's* judgment denying and dismissing the "Application to Appoint Successor Fiduciary" was plainly final. It totally and finally terminated all proceedings on said application. The Court of Appeals' judgment reversed this judgment and remanded with peremptory instructions to appoint a fiduciary. It left nothing to the Probate Court's discretion (see page 17 above). Thus the Court of Appeals' judgment, also, disposed finally of every litigable issue in connection with said application. Therefore, the judgment of the Court of Appeals in the case tried by the Probate Court is "final." *Forgay* v. *Conrad* (1848), 6 How. (47 U. S.) 201, 12 L. Ed. 404. *Carondelet Canal & Nav. Co.* v. *Louisiana* (1914), 233 U. S. 362, 58 L. Ed. 1001, 34 S. Ct. 627. *Rio Grande Western Railway Company* v. *Stringham* (1915), *supra*. *Cole* v. *Violette* (1943), *supra*. *Radio Station WOW, Inc.* v. *Johnson* (1945), 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475.

Perhaps it is also pertinent to the present point that, if the Supreme Court of the United States should answer the first constitutional question raised in this case in the affirm-

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ative, it could itself render final judgment in the cause by reversing the intermediate courts and affirming the Probate Court.

Since the Court of Appeals has rendered final judgment in the only case tried by the Probate Court, the mere fact that it has directed an accounting in the second case it adjudicated will not prevent the first phase of its judgment from being "final"; the five cases last cited above. Also *Winthop Iron Co.* v. *Meeker* (1883), 109 U. S. 180, 27 L. Ed. 898, 3 S. Ct. 111. And see note 2 to the opinion of the Court by Mr. Justice Frankfurter in *Radio Station WOW, Inc.* v. *Johnson, supra,* 326 U. S. at page 125, 89 L. Ed. at pages 2098-9, 65 S. Ct. at pages 1478-9.

B

For several reasons, among them one suggested by *Winthrop Iron Co.* v. *Meeker* (1883), *supra,* that part of the Court of Appeals' judgment which annuls finally the settlement of Mrs. Wisner's accounts and definitively opens them up to Mrs. Kaminski's exceptions is believed also to be a final judgment. However, since the phase of the Court of Appeals' judgment first discussed is so clearly final, and since jurisdictional requirements are therefore satisfied, it would probably be improper to take space here to go into the finality of the second phase of its judgment.

III. Validity of a State Statute Drawn In Question?

As the record discloses, Mr. Wisner raised every question now presented concerning the validity of Ohio General Code §10506-55 at the earliest possible moment in the only ways available to him.

In the Court of Appeals, Mr. Wisner raised the question of the repugnancy to §1 of the XIV Amendment of Mrs. Kaminski's "Application to Appoint Successor Fiduciary"

filed under pretended authority of §10506-55, and therefore of §10506-55 if construed to authorize said pleading, both by brief and orally. (See appendix, pages 43 to 45.)

Mr. Wisner could not have raised the question earlier since he knew nothing of the proceedings in the Probate Court. Moreover, he could not, in any event, have made any complaint concerning the judgment of the Probate Court. Although its failure to issue the notices required by law was fraught with potential harm to him, he was not in the end injured. Its ultimate judgment was favorable to him.

The second and third constitutional questions arise out of the fact that the Court of Appeals, instead of reversing and remanding for a new trial on said application, itself granted it finally; thus preventing Mr. Wisner from ever being heard on the merits of said application. This was something Mr. Wisner had no way to anticipate. Therefore, his first chance to raise the second and third constitutional questions was by application for rehearing addressed to the Court of Appeals immediately after its decision was announced. (See appendix, pages 46 to 48.)

It may be pertinent that the application for rehearing was filed before the Court of Appeals had entered judgment and that the entry denying it was contained in the judgment itself.

The fourth constitutional question arises out of the fact that the Court of Appeals decided the merits of the alleged action against the late Anna Miller Wisner to open her accounts. That the Court of Appeals would take such a step was also something Mr. Wisner could not anticipate. Again, his first chance to present the constitutional questions raised was by application for rehearing. (See appendix, pages 47 and 48.) As already noted, the denial of said application for rehearing was part of the Court of Appeals' judgment.

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All four constitutional questions were duly raised in the Supreme Court of Ohio by the assignment of the errors committed by the Court of Appeals duly filed in said Supreme Court. (See pages 11 to 13 above.)

Therefore, Mr. Wisner did duly draw in question the validity of Ohio General Code §10506-55 as construed and applied in this case by the Court of Appeals of Columbiana county, Ohio.

IV. Judgment "in Favor of" Validity?

It is perhaps unnecessary to point out that, when the Supreme Court of Ohio dismissed Mr. Wisner's appeal of right on the ground that "no debatable constitutional question is involved", it thereby held that §10506-55 was, as construed and applied by the Court of Appeals, constitutional beyond possibility of debate. See *Van Huffel* v. *Harkelrode* (1931), 284 U. S. 225, 76 L. Ed. 256, 52 S. Ct. 115, 78 A.L.R. 453. Such a judgment is of course a judgment "in favor of" the validity of said statute

V. Are the Constitutional Questions "Substantial"?

Every litigated case involves two kinds of justice, *first*, the justice of the controversy between the parties, *second*, the justice with which the courts superintend and conduct the litigation of that controversy.

The Justice of the Controversies Between the Parties to This Case Is Left Somewhat Obscure by the Record

Since no one knows what kind of fiduciary the "Application to Appoint Successor Fiduciary" is an application for, the record in this case can hardly contain a definitive answer to the question of the justice, as between Mrs. Kaminski and her father, of the ultimate controversy over the merits of said application.

To be sure, the record does show, among other things, that the question whether Mrs. Kaminski has any further right to the existence of a personal representative of the late Mrs. Wisner was once litigated between Mrs. Kaminski and Mr. Wisner, in the Probate Court of *Stark* county, and that it was there adjudicated and is now *res judicata* that Mrs. Kaminski has by her conduct forfeited any such right. The record therefore shows that, *if* the application should prove to be an application to appoint a new personal representative of Anna Miller Wisner, deceased, then it is without merit and unjust as to Mr. Wisner.

Likewise, the record shows that Mrs. Kaminski's original guardianship terminated in 1942 and that she is now an adult 27 years old. It also shows that she is at least competent enough to select and employ as her counsel one of the most able and successful law firms of Ohio. The record therefore shows that, *if* the application should prove to be an application to appoint a new guardian of Mrs. Kaminski, it is also without merit.

However, if the application proves to be an application to appoint some third kind of fiduciary, then what the record shows concerning the merits of the application as thus considered, and therefore concerning the justice of the controversy between the parties with respect to it, will remain forever unknown unless it is ultimately established just what it is that Mrs. Kaminski has applied for.

The record, aside from certain strong presumptions it raises against Mrs. Kaminski, shows nothing as to where justice lies in the controversy the Court of Appeals has injected into this case, *i.e.*, the controversy over the merits of Mrs. Kaminski's action against the late Mrs. Wisner. The Court of Appeals has, it is true, decided this controversy in Mrs. Kaminski's favor. However, it did so without trial. Therefore, the record cannot contain any information about

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its merits other than what the presumptions against Mrs. Kaminski provide. As previously stated, the record does not even contain the pleadings.

Thus, the procedural history of this case makes it impossible for the record to raise many constitutional questions concerning the merits of the controversies between the parties.

The Conduct of This Case by the Courts Below

The constitutional questions presented in this case are therefore almost entirely questions that concern the *second* kind of justice mentioned above, *i.e.*, they concern the justice with which the litigation of this case was superintended and conducted by the courts below, and especially by the Court of Appeals of Columbiana county, under the provisions of §10506-55 as construed and applied by said courts.

In Daniel Webster's argument to the Supreme Court of the United States in the *Dartmouth College* case (1819), 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629, he quotes the following passage from Lord Coke:

> "No man shall be disseised, &c, unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land; that is (to speak it once for all), by the due course and process of law." *Co. Inst.* 46.

Webster then says (4 Wheat., page 581, 4 L. Ed., page 645):

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

The sincerity, learning and truth of Webster's argument made a deep impression at the time, which persisted. It has been widely believed that when the XIV Amendment was subsequently drawn, it was deliberately designed to enforce

upon the states, among other things, a rigid observance of the minimum principles of procedural justice thus stated by Webster. These principles are elementary. They are recognized and informally observed even among savages as essential to an appearance of doing justice. In the years since the adoption of the XIV Amendment, Webster's argument has often been paraphrased by the Supreme Court of the United States as an expression of its own views. *E.g.*, *Truax* v. *Corrigan* (1920), 257 U. S. 312, 332, 66 L. Ed. 254, 263, 42 S. Ct. 124, 129; *Powell* v. *Alabama* (1932), 287 U. S. 45, 68, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64.

What happened in the Court of Appeals in this case is already apparent: it condemned when it had not heard, it proceeded without inquiry, it rendered judgment without trial.

If it be true that the purpose of the XIV Amendment is to enforce upon the states an observance of the fundamental standards of justice that are part of the common inheritance of western civilization, as the Supreme Court of the United States has often indicated, then it is submitted that the constitutional questions presented in this case are most substantial.

• • • • • • •

In conclusion, it should perhaps be repeated that the questions presented in this case are as much equal protection questions as they are due process questions. Mr. Wisner expressly invoked the equal protection clause of the XIV Amendment in his application for rehearing in the Court of Appeals (see page 47), and, as he said in that application:

> "There is no other recorded instance, in Ohio, where a person, who has a lawful interest in connection with

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> the appointment of a fiduciary and appears prior to the appointment and asks to be heard in connection with it, has been denied a hearing."

The violations of the guaranties of equal protection and due process, while they take a somewhat novel form in this case, are so plain that no citation of authority should be needed beyond the bare citation of the XIV Amendment.

With respect to the ambiguity and uncertainty of the "Application to Appoint Successor Fiduciary", it is a first principle of equal protection and due process that a defendant to litigation is denied the actuality of a hearing when he is prevented from knowing what he has to meet. For example, a statute which authorizes a charge so vague and indefinite that men of common intelligence must necessarily differ as to its meaning violates the first essential of due process. *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127; *Collins* v. *Kentucky* (1914), 234 U. S. 634, 638, 58 L. Ed. 1510, 1511, 34 S. Ct. 924, 925; *International Harvester Co.* v. *Kentucky* (1914), 234 U. S. 216, 221, 58 L. Ed. 1284, 1287, 34 S. Ct. 853, 855-6.

The questions that involve the Court of Appeals' final adjudication in Mrs. Kaminski's favor of the merits of her "Application to Appoint Successor Fiduciary" and of her pretended action to open Mrs. Wisner's accounts without permitting Mr. Wisner any hearing on the merits of either, are novel to this extent:

Heretofore there has apparently been only one case before the Supreme Court of the United States in which a state court has openly decided litigation without allowing a person adversely interested to be heard, to wit: *Windsor* v. *McVeigh* (1876), 93 U. S. 274, see pages 277-8, 23 L. Ed. 914, see page 916.

WHEREFORE: Appellant Harry J. Wisner respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Judicial Code §237(a), 28 U.S.C. §344(a), 28 U.S.C.A. §344(a).

Respectfully submitted,

HARRY J. WISNER,
Appellant.

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APPENDIX

I. Former Revivor Proceedings in Probate Court

Prefatory Note: The Court of Appeals, in a statement in its opinion of which the purport is not in all respects clear (see page 53 below at note 24), indicates that, at the time it heard this case, a proceeding was pending in the Probate Court to revive Mrs. Kaminski's alleged action against Mrs. Wisner. This is absolutely untrue. The only revivor proceeding that Mrs. Kaminski thus far even claims to have commenced was dismissed prior to the filing of her "Application to Appoint Successor Fiduciary". In deference to the respect which reviewing courts properly pay to statements by the courts below, sufficient is being quoted from the record to establish the truth of the statement made here that the Court of Appeals' statement is incorrect.

The portions of the record quoted are (a) the motion to revive filed by Mrs. Kaminski on July 24, 1944 (of which no notice was then given, on which no process was then issued and on which, consequently, no proceeding was then commenced), (b) the conditional order of revivor subsequently made and issued on September 6, 1944 and thereafter served on Mr. Wisner, and (c) the judgment quashing said conditional order and dismissing said motion to revive, rendered October 23, 1945 and journalized October 30, 1945.

A

Motion to Revive

(Filed July 24, 1944)

Now comes Kathleene Kaminski and represents to the court that since the commencement of this action for accounting under the exceptions and amendment to exceptions filed by Kathleene Kaminski that Anna Miller Wisner, the guardian of said Kathleene Kaminski, has died, and that Harry J. Wisner is the duly appointed, qualified and acting

administrator of the estate of Anna Miller Wisner, and the right of action survives the death of said Anna Miller Wisner, and ought to be determined between said administrator and Kathleene Kaminski, and moves the court to revive this action in the name of said administrator so that the action may proceed to final determination.

B

CONDITIONAL ORDER OF REVIVOR

(Entered and Issued September 6, 1944)

Now comes Kathleene Kaminski and suggests the death of Anna Miller Wisner, defendant, since the commencing of this proceedings, and that Harry J. Wisner has been duly appointed and qualified as the administrator of said decedent's estate, and the court being satisfied thereof, on motion of said Kathleene Kaminski, it is hereby ordered that unless the said Harry J. Wisner, administrator as aforesaid, shall, on or before the thirtieth day of September, 1944, show cause against revivor of the same, said proceeding herein shall stand revived.

Exceptions to Harry J. Wisner.

C

JUDGMENT OF DISMISSAL

(Entered October 30, 1945)

This day this cause came on to be heard on Harry J. Wisner's "Motion to Quash and to Dismiss", on his "Motion to Strike, &c", on the documentary evidence proffered and admitted herein, and on the briefs and arguments of counsel.

On consideration, the Court finds that the conditional order of revivor that was heretofore purportedly made herein by this Court on its own motion, that was thereafter issued against the Administrator of the Estate of the late Anna Miller Wisner of Stark county, Ohio as defendant in revivor and that was ultimately served upon the movant Harry J. Wisner as an individual, was thus made, issued

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and served after the said Estate of Anna Miller Wisner, deceased, had been finally settled and closed by decree of the Probate Court of Stark county, Ohio, after the said Court had duly approved and settled said administrator's final account and had finally discharged him, and after it had duly accepted his resignation pursuant to G. C. § 10506-53 and he had ceased to exist.

The Court therefore finds that the said conditional order of revivor and the issuance and service thereof are illegal and void. Harry J. Wisner's motions to vacate and quash the same are accordingly sustained, and it is ordered that the said conditional order of revivor, the writ embodying the same and the service thereof, be, and the same hereby are, quashed, vacated, set aside and utterly held for naught.

With respect to the motion filed in this Court by Kathleene Kaminski under G. C. §§ 11403 to 11405 inclusive to revive against said Administrator of the Estate of Anna Miller Wisner, as defendant in revivor, an alleged action that the said Kathleene Kaminski claims to have had pending in this Court against the said Anna Miller Wisner at her death on November 10, 1943, the Court finds that no conditional order of revivor was ever issued against said Administrator upon said motion to revive while he was in being, that no conditional order of revivor was ever served upon him, that he never waived either the issuance or service of process, and that he did not otherwise enter his appearance in any proceeding upon said motion to revive.

The Court therefore finds that this Court has never had jurisdiction of the person of said Administrator as the defendant in revivor herein. The motions to strike said motion to revive and to dismiss the purported revivor proceedings thereon are accordingly sustained, and it is considered and ordered that Kathleene Kaminski's said motion to revive be, and it hereby is, stricken from the files of this Court, and that the purported revivor proceedings thereon be, and they hereby are, finally dismissed.

By special request of counsel for Kathleene Kaminski, it is hereby stated that the dismissal herein of the purported revivor proceedings by Kathleene Kaminski under G. C. §§ 11403 to 11405 inclusive does not and could not prejudice such other independent proceedings, if any there be, as

Kathleene Kaminski might be entitled to institute under provisions of the General Code or laws of this State not related to the sections aforesaid.

It is further considered and adjudged that Kathleene Kaminski pay all costs incurred in the revivor proceedings hereby dismissed, commencing with the costs of the motion to revive filed July 24, 1944 and herein ordered stricken, and the said costs are hereby taxed against Kathleene Kaminski in the sum of $—.

II. Present Case in Probate Court

The parts quoted from the record of the Probate Court in the present case are (a) the "Application to Appoint Successor Fiduciary" and (b) the Probate Court's judgment denying and dismissing said application.

A

Prefatory note: Mrs. Kaminski's *ex parte* "Application to Appoint Successor Fiduciary", without containing actual false statements of fact, was so constructed as to lead even a fairly careful reader to draw false *inferences* of fact. These false inferences are here contradicted by footnotes. There were, of course, no footnotes to the original.

Application to Appoint Successor Fiduciary

(Filed October 30, 1945)

Now comes Kathleene Kaminski, formerly Catherine Miller Wisner, and represents to the Court that prior to her death on November 10, 1943, Anna Miller Wisner was the duly appointed, qualified and acting guardian of the person and estate of this applicant;[9] that on the date of her

[9] The inference that Mrs. Wisner continued to be "the duly appointed, qualified and acting guardian of the person and estate of" Mrs. Kaminski until Mrs. Wisner's death on November 10, 1943, is of course false. Mrs. Wisner ceased to be guardian of Mrs. Kaminski's person upon Mrs. Kaminski's marriage June 20, 1940 (Ohio General Code §10507-20, 114 Ohio Laws 388) and ceased to be guardian of her estate when she reached the age of 21 on June 17, 1942 (Ohio General Code §10507-60, 114 Ohio Laws 398). The Court of Appeals has itself so found.

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death, said guardian had, by that time, filed six separate accounts in connection with the administration of her trust;[10] that exceptions had been filed by this applicant to said several accounts,[11] which exceptions were pending and undisposed of at the time of the death of the said Anna Miller Wisner;[12] all of which will more fully appear if reference be had to Docket 32, page 392 of the administration Dockets of this county in Case No. 26368 in this court.[13]

Applicant further represents that she is a person beneficially interested in the administration of said trust and guardianship.

Applicant further represents that a vacancy has occurred in the trust and guardianship hereinbefore described by reason of the death of said Anna Miller Wisner[14] and that such contingency is not otherwise provided for by law.

WHEREFORE, applicant prays that this court shall appoint and issue letters of appointment as *fiduciary*[15] to some competent person or persons, who shall qualify according to

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[10] The inference that there were accounts that had been recently filed and never settled is also untrue. The sixth and last of Mrs. Wisner's accounts was filed July 1, 1942, slightly more than a year and four months before her death, and was settled finally on July 31, 1942, a year and a quarter before her death. Her first account had been filed and settled in early 1925, more than eighteen years before her death.

[11] The inference that Mrs. Kaminski filed her purported exceptions to Mrs. Wisner's accounts while said accounts were still open is also untrue. The purported exceptions were in fact filed after Mrs. Wisner's six accounts had all been settled finally; two months and seven days after her final account had been settled, seventeen years, three months and twenty-five days after her first account had been settled, and intermediate periods after the settlements of her other four accounts.

[12] Needless to say, the purported exceptions were never "pending and undisposed of" *unless* a valid action was commenced against Mrs. Wisner to open her accounts.

[13] When reference is had as requested to the record in Case No. 26368, the various inaccuracies in Mrs. Kaminski's application that are mentioned in these footnotes at once appear.

[14] The representation that a vacancy occurred in Mrs. Kaminski's guardianship "by reason of the death of said Anna Miller Wisner" perhaps passes beyond misleading inference and achieves categorical untruth. For nearly a year and a half before Mrs. Wisner's death, there had been no guardianship in existence to become vacant.

[15] Italics supplied.

law and execute the guardianship and trust of this applicant to its proper termination as provided by Section 10506-55 of the General Code of Ohio.

B

Prefatory note: In the revivor proceedings shown above, Mr. Wisner appeared specially. He was contesting jurisdiction of his person as administrator of his wife's estate. For purposes of such special appearance only, he was represented by one Ralph Atkinson. When said purported revivor proceedings were quashed, Mr. Atkinson's employment and authority were of course ended.

At the time the "Application to Appoint Successor Fiduciary" was filed, the only notice of its filing given to anyone was a copy of it sent to Mr. Atkinson, presumably as former attorney for Mr. Wisner. The Probate Court could not issue notices, because the necessary information was not furnished. Having been so recently employed by Mr. Wisner in connection with a matter so closely related, it seemed to Mr. Atkinson his duty to see that Mr. Wisner got notice. However, he felt a slight delicacy about baldly soliciting reemployment. What he did, therefore, was to appear as a friend of the Probate Court and suggest that it ought to require Mrs. Kaminski to amend her application so that the notices required by law could be issued. If Mr. Wisner was dissatisfied with Mr. Atkinson's failure to bring the incessant litigation against him to an end, Mr. Wisner would thus have a chance to employ other counsel.

It is to the suggestions made by Mr. Atkinson for the foregoing purpose that the Probate Court has reference near the beginning of its following judgment.

JUDGMENT OF THE PROBATE COURT

(Entered January 4, 1946)

This day this cause came on to be heard upon the "Application to Appoint Successor Fiduciary" filed herein by

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Kathleene Kaminski, upon two several suggestions to the Court by Ralph Atkinson, appearing herein as a friend of the Court, and upon the evidence, the record and the arguments and briefs of counsel.

The said Ralph Atkinson having suggested to the Court (1) that the Court is without jurisdiction to hear said Application as an application for the appointment of a guardian for the reason that the proceeding thereon has not yet been commenced by the issuance to or service upon Kathleene Kaminski and her next of kin resident within the county of the notices of hearing required by G. C. § 10507-4, and (2) that the Court is without jurisdiction to hear said Application as an application for the appointment of a personal representative for the late Anna Miller Wisner for the reason that the proceeding thereon has not yet been commenced by the issuance to and service upon the next of kin of said decedent resident within the county of the citation required by G. C. § 10509-3, and the Court having taken notice of said Suggestions, the Court finds that said Application is for the appointment of a fiduciary under G. C. § 10506-55, that no notice to or citation of interested persons is necessary for the appointment of any fiduciary under the provisions of G. C. § 10506-55, and that the Court therefore has jurisdiction to proceed to hear said Application on the merits without the issuance or service of notices or citations under either G. C. §§ 10507-4 or 10509-3.

The Court, on consideration of its jurisdiction of the subject matter of said Application, finds that it does have jurisdiction of the subject matter of the same and, therefore, that it has the power to make a valid appointment of a fiduciary upon said Application.

However, the Court finds that the purpose of said Application is to procure the appointment of a fiduciary to defend the interest of the late Anna Miller Wisner with respect to certain purported proceedings against her which may or may not have been commenced in this Court prior to her death on November 10, 1943; that the said Kathleene Kaminski procured the appointment of a personal representative for the said Anna Miller Wisner by the Probate Court of Stark county, Ohio on February 14, 1944 after a contested litigation; that Kathleene Kaminski procured

said appointment when an administration of the late Anna Miller Wisner's estate would otherwise have been unnecessary by representing to the said Probate Court of Stark county that such appointment was required in order to provide her with a party defendant against whom she might prosecute her remedies on the alleged claims against Anna Miller Wisner asserted in said purported proceedings in this Court; that Kathleene Kaminski thereafter failed to proceed against the personal representative thus appointed by the Probate Court of Stark county at her instance; that, on July 25, 1944, six days before the date theretofore fixed for the hearing on the final settlement of said estate, Kathleene Kaminski filed in the said Probate Court of Stark county certain objections to said settlement wherein, among other things, she requested that the settlement and closing of said estate be delayed for the purpose of giving her a further opportunity to proceed against said personal representative with respect to said alleged claims; that at the hearing thereafter held on July 31, 1944, the said Probate Court of Stark county, upon due consideration of said objections, ordered all matter alleged in support of said request to be stricken out of said objections, and that the said court thereupon finally settled and closed said estate, accepted the resignation of said personal representative and finally discharged him.

The Court finds Kathleene Kaminski guilty of laches in that Kathleene Kaminski, after thus procuring the appointment of a personal representative of the late Anna Miller Wisner for the asserted purpose of prosecuting against him such remedies on her alleged claims against the late Anna Miller Wisner as she might elect to pursue, thereafter neglected and failed to pursue any of them; and the Court finds that, upon the facts of this case, it would be improper for this Court to appoint a fiduciary for the purpose of again providing Kathleene Kaminski with a party defendant to proceedings based on said alleged claims.

Accordingly, it is considered, ordered and decreed that said "Application to Appoint Successor Fiduciary" be, and it hereby is, denied, and that all proceedings by Kathleene Kaminski in Case No. 26368 be, and they hereby are, dismissed.

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Exceptions to Kathleene Kaminski and to all other interested persons; but not to *amici curiae.*

Motion for a new trial, duly filed by applicant, is ordered overruled. Exceptions to applicant.

III. Proceedings in Court of Appeals

A

Mr. Wisner's affidavit in support of his application to intervene in the Court of Appeals, in so far as is now pertinent, is set forth on page 9 above and the order of the Court of Appeals making him a party is quoted in full on pages 10 and 11.

B

Leave to Amicus Curiae to Withdraw

(Entered September 19, 1947)

This day this cause came on to be heard on an oral motion by Ralph Atkinson, an attorney at law of this Court, for leave to withdraw from any further appearance *amicus curiae* in this cause and for leave to withdraw the *amicus curiae* briefs on the merits of this cause heretofore filed herein by him.

On consideration, it appearing to the Court that Mr. Atkinson now represents Mr. Harry J. Wisner, who has been made a party to this cause as an appellee, leave to withdraw as *amicus curiae* and to withdraw said briefs is hereby granted, and the fact that Mr. Atkinson has withdrawn his appearance as *amicus curiae* is hereby noted.

C

Excerpts from Mr. Wisner's

Memorandum of Additional Authority

(Filed November 8, 1947)

This [*i.e.*, the Memorandum] is a supplement to the section of appellee's [Mr. Wisner's] brief headed "I. Appel-

lant's Application Ambiguous" that commences on page 17. * * * The citation "XIV Amendment" on page 19 of course refers to § 1 of the XIV Amendment to the Constitution of the United States. * * *

If the judgment below were reversed and the case remanded to the trial court, the court would thereby hold that appellant's application is a valid pleading * * *.

However, to force Harry J. Wisner to attempt a defense against said application would be to deny him due process of law, contrary to said XIV Amendment * * *.

* * * * * * *

It is unreasonable and a denial to Harry J. Wisner of due process to require him, at his own risk, thus to speculate as to the nature of the fiduciary purportedly applied for by appellant. It is unreasonable and a denial of due process to require him to anticipate every possible theory of said application and put in a defense against it.

D

MR. WISNER'S ARGUMENT IN COURT OF APPEALS

Excerpt from bill of exceptions

(At hearing November 12, 1947)

Thereupon, resuming the argument for said appellee [Harry J. Wisner], said counsel for appellee argued that appellant, in asking the Court of Appeals to reverse the judgment of the Probate Court and remand the cause for a new trial on appellant's "Application to Appoint Successor Fiduciary," was asking the Court of Appeals to deny Harry J. Wisner due course of law contrary to Article 1, § 16 of the Constitution of the State of Ohio and due process of law contrary to § 1 of the XIV Amendment to the Constitution of the United States, for the following reasons, to wit:

If appellant's said application is invalid, the judgment of the Probate Court denying and dismissing it is of course right and cannot be reversed. As a result, if the

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Court of Appeals should reverse and remand for a new trial in accordance with appellant's request, the Court would necessarily be holding that the application is a valid application to appoint a fiduciary. By holding the application valid, it would be holding that Harry J. Wisner must either meet it and defend against it, or else suffer the appointment of a fiduciary upon it. However, the application is constitutionally invalid because it does not advise Harry J. Wisner of what he has to meet. The application discloses neither what kind of fiduciary it purports to be an application for, nor what interest or whose interest the fiduciary supposedly applied for is expected to represent and protect. Moreover, appellant has refused throughout the proceedings on said application to make any disclosure on either point.

As a result, Harry J. Wisner cannot know what he has to meet. As a further result, Harry J. Wisner cannot know what his *actual rights* are, in spite of the fact that, on any theory of appellant's application, he has certain clear and undoubted rights in the premises. He cannot know what his actual rights are because, on different theories of the application, he has very different sets of rights. Therefore, as long as appellant refuses to disclose to Harry J. Wisner either what kind of fiduciary appellant has applied for or whose interest the fiduciary is to represent and protect, Harry J. Wisner cannot prepare an intelligent defense against appellant's application or be heard in defense of his actual rights. In consequence, he is effectively denied a hearing, contrary to the constitutional provisions aforesaid.

E

Docket Entry in Court of Appeals

(November 14, 1947)

11-14-47. Judgment reversed for error in dismissing and denying the application of Kathleene Kaminski for the appointment as fiduciary of some competent person or persons to execute the guardianship trust to its proper termination, to wit, the hearing and settling of the exceptions filed to the accounts of the guardian Anna Miller

Wisner in accordance with the provisions of Sec. 10506-55, General Code. Remanded. Exceptions.

F

Prefatory note: The constitutional question set forth in the jurisdictional statement as "Question 3" was emphatically raised in Mr. Wisner's application for rehearing in the Court of Appeals, but at such length as to make any quotation concerning it inexpedient save for the allusion to it immediately after the subhead "Constitutional Questions, Conclusion", below. The other constitutional questions, however, are dealt with rather fully in the excerpt quoted below from Mr. Wisner's "Application for Rehearing."

EXCERPT FROM MR. WISNER'S APPLICATION FOR REHEARING

(Duly presented November 24, 1947)

Harry J. Wisner is denied a hearing on the application

Moreover, by remanding the case to the Probate Court with directions to appoint a fiduciary on appellant's application instead of sending it back for a new trial, this Court's decision completely deprives Harry J. Wisner of any right ever to be heard on the merits of appellant's application or on the jurisdiction of the court below to entertain it. If the court below is required to make an appointment, regardless of what evidence Harry J. Wisner introduces or any argument he makes, then it is obvious that this Court will in fact have forbidden the court below to give him any hearing at all.

This Court will have deprived Harry J. Wisner of the right *ever* to be heard in the court below because he has had no previous chance to be heard there. He knew nothing of the filing of appellant's application until after the matter had been lodged in this Court by appellant. He did not know of it previously because the process upon it required by law was never issued or served by the court below, which could not issue it because appellant refused to let the court below have the information necessary to issue it.

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This Court's decision forecloses the facts

This Court's decision is violative of the same constitutional guaranties in still another respect. It flatly directs the court below to open the accounts of Anna Miller Wisner, deceased, and consider appellant's purported exceptions. In the opinion in the prohibition case, this Court carefully noted that appellant's right to have the accounts opened and the exceptions considered depended on the answers to questions of fact that only the court below is competent to try, namely, "Was the Sixth and Final Account settled in appellant's absence and without actual notice to her?" and "Was there fraud in said account?" However, the present decision of this Court, with no hearing on either point, decides both these questions of fact adversely to Harry J. Wisner's contentions. It also decides all the other questions connected either with the pretended action to open said accounts or with the revivor of it, merit and jurisdictional, without any hearing on any of them. Indeed, it decides them before any proceeding to revive said pretended action has even been commenced.

Constitutional Questions, Conclusion

To summarize, Harry J. Wisner has rights that are given him by law, regardless of which interest it is that the proposed fiduciary is to represent. If the decision of this Court is reduced to judgment, it will strip Harry J. Wisner of those rights without affording him an opportunity to be heard in their defense. The decision of this Court, if reduced to judgment, will therefore not only deny Harry J. Wisner the due course of law guaranteed by Article 1, § 16 of the Constitution of the State of Ohio and the due process of law guaranteed by § 1 of the XIV Amendment to the Constitution of the United States. It will also strip him of the equal protection of the laws guaranteed him by § 1 of said Amendment: There is no other recorded instance, in Ohio, where a person, who has a lawful interest in connection with the appointment of a fiduciary and appears prior to the appointment and asks to be heard in connection with it, has been denied a hearing.

Also, since said decision holds that the violation of the

aforesaid constitutional guaranties is purportedly authorized by § 10506-55, General Code, it is evident that, as interpreted by this Court, § 10506-55 is violative of each of the constitutional provisions aforesaid and that, unless it can be re-interpreted to avoid said violations, it is unconstitutional and void under the Constitutions of both the State of Ohio and the United States.

G

Docket Entry

(December 8, 1947)

Application for rehearing denied. Exceptions.

H

Prefatory note: Unfortunately, the opinion of the Court of Appeals contains several mistakes with respect to the record facts, and several contradictory statements. To avoid confusion, each mistake detected has been indicated by interpolating the word "mistake" in square brackets. The nature of the mistake is indicated by a footnote. There were no footnotes to the original.

Opinion of Court of Appeals

(Issued December 11, 1947)

Messrs. Hart and Hart, Canton, Ohio, for applicant-appellant; *Mr. Ralph Atkinson,* Salem, Ohio, for appellee; *Messrs. Metzger, McCorkhill & Metzger,* Salem, Ohio, for *amicus curiae,* the Columbia Casualty Company.

Phillips, J.: Kathleene Kaminski, a resident of Mahoning county, appeals on question of law from a judgment of the Court of Probate of Columbiana County, Ohio denying and dismissing the following application filed by her in that court on October 30, 1945:

[The "Application to Appoint Successor Fiduciary" which appears at this point in the Court of Appeals' Opinion is set forth in this appendix at pages 38 to 40 above].

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On January 4, 1946, the judge of the Court of Probate caused the following entry to be spread upon the journal of that court:

> [The judgment of the Probate Court which appears at this point in the Court of Appeals' opinion is set forth in this appendix beginning on page 40 above.]

Anna Miller, mother of Kathleene Kaminski, was duly appointed guardian of her person and estate on May 12, 1923, by the court of probate of Columbiana county, at which time Kathleene Kaminski was about two years old; and thereafter the guardian married Harry J. Wisner. Subsequent to her appointment, Anna Miller Wisner administered such trust until the time of her death on November 10, 1943 [*mistake*],[16] filed five interim accounts therein during the minority of Kathleene Kaminski [which terminated June 17, 1942], and on June 24, 1942, paid and delivered the trust estate to her ward. On July 1, 1942, she filed her sixth and final account; and on July 31, 1942, the Court of Probate of Columbiana county settled and approved all of the six accounts and discharged her as such guardian.

It is conceded that Kathleene Kaminski filed exceptions and amended exceptions to all six of such accounts on October 7, 1942, and on May 24, 1943, respectively [*mistake*],[17]

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[16] The statement that Mrs. Wisner administered the guardianship trust until her death on November 10, 1943 is of course mistaken. The statement apparently results from a misleading statement in Mrs. Kaminski's application; see page 38 above, at note 9. The Court of Appeals itself finds at one place and another in its opinion, (1) that the guardianship of Mrs. Kaminski's person ceased on June 20, 1940 on her marriage, (2) that the guardianship of her estate ceased June 17, 1942 upon her reaching age 21, (3) that she received the corpus of the guardianship estate from her mother on June 24, 1942, and (4) that, on July 31, 1942, the Probate Court settled and approved Mrs. Wisner's accounts and discharged her as guardian. Thus, the Court of Appeals itself contradicts said statement.

[17] It was *not* conceded that Mrs. Kaminski filed valid "exceptions and amended exceptions" as the statement in the opinion implies. Mr. Wisner expressly refused to make any such concession; see his bill of exceptions in the Court of Appeals. Also, nothing that purported to be a set of amended exceptions was ever filed in the Probate Court. A paper was filed that purported to be an "amendment to" the pretended exceptions.

service on neither of which was ever made upon the guardian, who died without entering her appearance; that Harry J. Wisner, the guardian's spouse and plaintiff's [Mrs. Kaminski's] father, was appointed administrator of her [Mrs. Wisner's] estate by the Court of Probate of Stark county, where she resided when she died; that he administered her estate and filed his final account therein on June 26, 1944, and all [Mrs. Kaminski's] exceptions thereto were disposed of favorably to him by the Court of Probate of Stark county; and [that] on July 31, 1944, his accounts as administrator of such estate were settled and approved by the Court of Probate of Stark county, the judge of which court accepted his resignation and discharged him as such administrator.

By marriage on June 20, 1940, plaintiff became Catherine Miller Wisner Kaminski, since known as Kathleene Kaminski, and by virtue of the provisions of Section 10507-20, General Code, such act determined the guardianship as to her person.

Plaintiff reached her majority June 17, 1942, and as urged by counsel for *amici curiae*,[18] by virtue of her new status and the provisions of Section 10507-60, General Code, such guardianship was terminated as to her estate, except as he does not urge, and we hold, as to the settlement of the accounts of the guardian of her estate, which has never been done [*mistake*].[19] The "trust had not terminated so long as the right existed in the ward to file exceptions to the accounts as provided in Section 10506-40, General Code" [*mistake*].[20]

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[18] The Columbia Casualty Company, Mrs. Wisner's surety at the end of the guardianship, appeared *amicus curiae* in the Court of Appeals. To reduce the number of briefs filed in the Court of Appeals, Mr. Wisner let the Columbia Casualty Company join in his brief. Apparently this is how he and the Columbia Casualty Company came to be collectively referred to as "*amici curiae*" throughout the Court of Appeals' opinion.

[19] The statement that Mrs. Wisner's accounts were never settled is a mistake. It is of course contrary to the undisputed record facts. It is also contrary to the Court of Appeals' own finding at the end of the third paragraph back.

[20] The statement that the "trust had not terminated so long as the right existed in the ward to file exceptions to the accounts as provided in Section 10506-40, General Code," is significant because of the included finding that "the right existed in the ward to file exceptions to the accounts as provided in" said statute. One of Mr. Wisner's main constitutional objec-

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See the opinion of this Court in the case of *Harry J. Wisner and the State of Ohio on relation of Harry J. Wisner, plaintiffs, v. the Probate Court of Columbiana county and Homer Hammond, Judge of said Court, defendants,* in which Judge Nichols said:

"This Court is further of the opinion that the Probate Court of Columbiana County did not lose jurisdiction

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tions is leveled against this finding, upon which the Court of Appeals' judgment seems in part to rest.

The statute referred to is Ohio General Code § 10506-40, 114 Ohio Laws 372, in force in 1942 but since repealed. With the cross references necessary to make it fully intelligible inserted in square brackets, it reads as follows:

"§ 10506-40. The determination of the Probate Court on the settlement of an account shall have the same force and effect as a judgment at law or decree in equity, as the particular case may require, and shall be final as to all persons having notice of the hearing, *except:*

"(a) Upon review or appeal according to law [in which case § 10501-56, 119 Ohio Laws 396, applies]; and

"(b) When an account is settled in the absence of a person adversely interested and without *actual* notice to him, [in which case] it *may* be *opened* on his filing exceptions to the account within eight months after such settlement [cf., Ohio General Code § 11632]; and

"(c) Upon any settlement of an account, [in which case] all former accounts *may* be so far *opened* as to correct a mistake or error therein, on condition, however, that a matter in dispute that has been previously determined by the court shall not be brought in question by either of the parties without leave of court upon good cause first shown; and

"(d) In case of fraud or collusion [in which case Ohio General Code §§ 11631 through 11643, and § 10507-27, 114 Ohio Laws 390, apply]; and

"(e) As against rights which are saved by statute to persons under disability [in which case § 10507-27, *supra,* Ohio General Code § 11603, and §§ 11631 through 11643, *supra,* apply]."

The reference above to § 11631 is to 103 Ohio Laws 426. The other sections without "Ohio Laws" citations are to be found in the official edition of the General Code of Ohio published by the commissioners of public printing of Ohio in 1910. All emphasis is added.

If a settlement of an account is attacked under any of the subparagraphs (b) to (e) of the foregoing statute, a set of exceptions to said account must be filed as part of the proceeding to open it. Like the answer in the original suit that must be tendered as part of an ordinary action

> by its order of settlement of the final account of the guardian on July 31, 1942; that its jurisdiction therein is continuing until such exceptions are finally disposed of * * *." [20a]

As is apparent from the quoted entry [of the Probate Court], the judge of the Court of Probate of Columbiana county, acting in accordance with the decision of the Supreme Court in the case of *Wisner et al., Appellants,* v. *Probate Court of Columbiana County et al., Appellees,* 145 Ohio St., 419, [61 N.E. 2d 889, to which Court the plaintiffs had] appealed from the decision of this Court to which reference is made *supra,* determined he had jurisdiction of the subject

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to open a judgment, such exceptions evidence under oath the concrete harm the complainant claims to have suffered because of the settlement in question. Moreover, if the account is ultimately opened, the exceptions become the pleading that raises the issues for trial in the proceedings that ensue.

However, a court does not make a determination that there is a "right" to file exceptions, and it certainly does not make an order "to hear and settle the exceptions" (see last paragraph of Court of Appeals' opinion), unless it has first found that a valid cause of action for opening the account involved actually exists.

Thus, the finding that "the right existed in [Mrs. Kaminski] to file exceptions to the accounts as provided in Section 10506-40, General Code" means the Court of Appeals made a finding that Mrs. Kaminski did have a good cause of action for opening Mrs. Wisner's accounts. It means, that is, that the Court of Appeals found Mrs. Wisner guilty of some kind of misconduct that would justify annulling the settlement of said accounts. Whether the Court of Appeals convicted Mrs. Wisner of causing said accounts to be settled in Mrs. Kaminski's absence and without Mrs. Kaminski's knowledge, or of fraud, or of one of the offenses described in the various statutes cross referenced above, the Court of Appeals does not say.

The constitutional objection to the finding is apparent. Whatever the offense of which the Court of Appeals convicted Mrs. Wisner, it convicted her without affording the least opportunity for a hearing on the question of her innocence or guilt. It did so, moreover, without having any means whatever of knowing whether she was in fact guilty or innocent.

[20a] How could jurisdiction "continue" on July 31, 1942 because of alleged exceptions that were admittedly not filed until October 7, 1942?

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matter of the quoted application,[20b] with which conclusion we find no fault,[21] but found Kathleene Kaminski guilty of laches for the reasons stated therein and denied such application, in which finding and conclusion we cannot concur and which *we reverse for the reason that the Court of Probate was required to appoint such*[22] *a fiduciary and accordingly Kathleene Kaminski is not guilty of "laches",*[23] by which the judge of the Court of Probate probably meant failure to prosecute, as set forth in the quoted entry, for upon his failure to make such an appointment she filed application for revivor [*mistake*][24] in accordance with the provisions of Section 10506-55, General Code. [↑] See *Wisner et al., Appellants,* v. *Probate Court of Columbiana County et al., Appellees,* [145 Ohio St. 419, 61 N.E. 2d 889,] *supra,* for a rather full recitation of the facts.

[20b] The Supreme Court of Ohio did not decide in *Wisner v. Probate Court* that the Probate Court had jurisdiction of the subject matter. It decided that the Probate Court had "power to determine" its jurisdiction of the subject matter and that prohibition would therefore not lie. So far as the Probate Court's jurisdiction to appoint a guardian was concerned, the Supreme Court of Ohio rather plainly intimated near the end of its opinion in *Wisner v. Probate Court* that the Probate Court had no such jurisdiction.

[21] An odd feature of the proceedings in the Court of Appeals in this case is that the Court of Appeals seemed to think it was hearing the prohibition case of *Wisner v. Probate Court* over again, with the same facts and the same issues. As appears from the next few lines of the opinion, the Court of Appeals reversed solely because of its agreement that the Probate Court had the "jurisdiction" the Probate Court itself said it had. It gave no reason why the Probate Court's *exercise* of its jurisdiction was erroneous except to say that the Probate Court was "required" to exercise its jurisdiction by granting, and not by denying, Mrs. Kaminski's application.

[22] There is no antecedent for the word "such".

[23] The emphasis is added. The passage italicised is the only statement in the Court of Appeals' opinion of a ground for reversing the Probate Court's judgment. *Why* was the Probate Court "required" to appoint a fiduciary? The opinion of the Court of Appeals does not say.

[24] No such "application for revivor" as that described in the opinion of the Court of Appeals was ever filed. In order to refute the Court of Appeals' statement on the subject, the pertinent portions of the record are set forth starting on page 35 above.

Counsel for *amici curiae* argue by way of recapitulation in their lengthy brief [25] that:

> "Thus, the Probate Court was required by law to deny appellant's application for each of the following reasons:
>
> "A. The application is hopelessly ambiguous. It requires the Court to guess at the kind of fiduciary desired.
>
> "B. Regardless of which kind of fiduciary the application is deemed to be an application for, the issuance and service of process upon it is required by law before any fiduciary can be appointed on it. However, even the issuance of process on appellant's application is impossible. It alleges none of the necessary information.
>
> "C. If it is an application to appoint a successor guardian for appellant, it had to be denied, both because there is no jurisdiction and because it has no merit. There was, and is, no vacancy in the former trust and guardianship to be filled.
>
> "D. If it is an application to appoint an original guardian for appellant, it had to be denied because:
>
> "1. There is no jurisdiction. Appellant is a resident of Mahoning County.
>
> "2. It has no merit. Appellant is an adult and is not alleged to be incompetent.
>
> "E. If it is an application to appoint a fiduciary to represent the interests of Anna Miller Wisner, deceased, it had to be denied because:
>
> "1. There is no jurisdiction, for each of the following reasons:
>
> "a. Said decedent died domiciled and resident in Stark County, Ohio. Therefore, only the Probate

[25] The brief and recapitulation referred to above were primarily Mr. Wisner's. See note 18 above.

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Court of that county has proper jurisdiction to appoint a personal representative for said decedent.

"b. The jurisdiction of the Stark County Probate Court is now completely exclusive. It has taken actual jurisdiction of all matters connected with the estate and representation of said decedent by appointing one personal representative for her.

"2. It has no merit, for each of the following reasons:

"a. No right or ground exists for the appointing of a new fiduciary to represent the interests of said decedent. From the allegations of appellant's application and her proof, it appears that appellant was not a creditor of said decedent. Moreover, there was no allegation, proof, or even suggestion, of any unadministered estate or of any other ground for appointing such a fiduciary.

"b. Even if appellant had been a creditor, any right to such an appointment is barred by laches. When, upon appellant's request, a previous opportunity was afforded her to prosecute her pretended claims, she failed to do so.

"c. Even if appellant had been a creditor, it is *res judicata* that appellant has lost all right to the existence of a fiduciary to represent said decedent's interest.

"Thus, since, for each of the foregoing reasons, the Probate Court was compelled to deny said application, therefore, for each of the foregoing reasons, its judgment denying and dismissing said application is correct.

"Accordingly, since the judgment of denial in the Probate Court of Columbiana County is correct upon each of ten independent grounds, it *is* right and should be affirmed."

In view of the conclusion we reach in this case and in the case of *Harry J. Wisner and the State of Ohio on rela-*

tion of Harry J. Wisner, Plaintiffs, v. *The Probate Court of Columbiana County and Homer Hammond, Judge of said Court, Defendants,* in which as stated *supra* Judge Nichols wrote the opinion for this Court, in which we dispose of some of the contentions of counsel for *amici curiae* made in this case, we deem it unnecessary to pass upon the assigned error of counsel for Kathleene Kaminski not disposed of elsewhere herein that the trial judge erred "in permitting counsel appearing as *amici curiae* to introduce evidence in opposition to appellant's application for the appointment of a successor fiduciary,"[26] nor the contentions of counsel for *amici curiae, supra;* and our answer to the "one basic question" counsel claim is presented is that "the judgment denying the foregoing application is not correct" and in our opinion that it does "appear from the record now before this Court that it is erroneous" and "contrary to law."

The Court of Probate of Columbiana county, Ohio having first acquired jurisdiction [of applicant's guardianship?], its jurisdiction [of the guardianship?] was exclusive of any other Court of Probate except as provided by law.[27]

The observations made by the Supreme Court in the case of *Wisner et al., Appellants,* v. *Probate Court of Columbiana County et al., Appellees, supra,* and the decision of this Court in the same case, *supra,* to some extent point the way to the conclusion we reach in the instant case.[?]

In our opinion *amici curiae* have gone unreasonably far in the procedure followed in this case.[27a] However we have disposed of the questions urged regardless of that fact.

The judgment of the Court of Probate is reversed for the reasons stated herein and the cause is remanded thereto

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[26] The trial court permitted the Columbia Casualty Company, appearing *amicus curiae,* to introduce in evidence a certified transcript of the proceedings in the Probate Court of Stark County to which the Court of Appeals refers earlier in its opinion. Mrs. Kaminski assigned the reception of this evidence as error.

[27] Under Ohio General Code § 10507-27, 114 Ohio Laws 390, which was still in force in 1942, the jurisdiction of the Probate Court of Columbiana county to open Mrs. Wisner's accounts was concurrent with the jurisdiction of the Courts of Common Pleas of Columbiana and Stark counties.

[27a] See note 26 above.

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with instructions to issue letters of appointment as fiduciary to some competent person or persons, who shall qualify according to law and execute the guardianship and trust of applicant Kathleene Kaminski to its proper termination, [and with instructions] specifically to hear and settle the exceptions filed [by Mrs. Kaminski] to the accounts of the guardian Anna Miller Wisner in accordance with the provisions of Section 10506-55, General Code.[28]

Judgment reversed and cause remanded.

Carter, P. J., and Nichols, J., concur.

I

Judgment of Court of Appeals

(Entered December 23, 1947)

This appeal from the Probate Court of Columbiana county, Ohio came on for hearing on the assignments of error, and the original papers and transcript and bill of exceptions from the Probate Court of Columbiana county, Ohio, and, on consideration of the briefs and arguments of Ian Bruce Hart, counsel for Appellant, Ralph Atkinson, counsel for Harry J. Wisner, Appellee, and Charles McCorkhill, counsel for *amicus curiae* the Columbia Casualty Company, and the court being fully advised in the premises, finds that there is error apparent upon the record in the proceedings and judgment of the Probate Court of Columbiana county, Ohio, prejudicial to the appellant.

It is therefore ordered, adjudged and decreed that the judgment of the Court of Probate of Columbiana county, Ohio be, and the same is, hereby reversed, vacated and set aside for error in dismissing and denying the application of Kathleene Kaminski for the appointment as fiduciary of some competent person or persons to execute the guardian-

[28] In the Court of Appeals' formal judgment, which is set forth in this appendix immediately following the above opinion, it remands "for further proceedings in accordance with this entry and the opinion of this Court". Thus, the above instructions to the Probate Court are as binding upon it as though contained in the judgment of the Court of Appeals proper.

ship trust to its proper termination, to wit, the hearing and settling of the exceptions filed to the accounts of the guardian, Anna Miller Wisner, in accordance with the provisions of Section 10506-55, G. C.

It is further ordered, adjudged and decreed that this cause be remanded to the Probate Court of Columbiana county below for further proceedings in accordance with this entry and the opinion of this Court, and that a special mandate therefore be sent to said court.

And further appearing that the Appellee, Harry J. Wisner, filed an application in this Court for a rehearing and a reargument of this cause, and the Court having fully considered said application, hereby orders and decrees that said application for rehearing, be, and the same is hereby denied, and the Appellee's Motion to Affirm is hereby overruled.

Exceptions to the Appellee, Harry J. Wisner.

IV. Proceedings in Supreme Court of Ohio

A

The assignment of the errors committed by the Court of Appeals is quoted in full on pages 11 to 13 above.

B

The following is an excerpt from the argument in Mr. Wisner's brief in the Supreme Court of Ohio in support of assignment of error II-A:

> "A. In connection with the first act charged, Mr. Wisner was never served with process and knew nothing of the proceedings. He had no chance to introduce evidence; no chance to be heard in any respect. By rendering final judgment granting applicant's application, the Court of Appeals has therefore denied him any chance ever to be heard on the merits of applicant's application, even in its ambiguous state."

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C

OPINION OF SUPREME COURT OF OHIO

(May 5, 1948)

It is ordered and adjudged that this appeal of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J., Turner, Matthias, Zimmerman, Sohngen and Stewart, JJ., concur.

Hart, J., not participating.